SUPREME COURT OF UNITED STATES OF AMERICA

STATE OF LOUISIANA	:	
	:	DOCKET NO.:
VERSUS	:	
	:	FILED:
BILLY J. TAYLOR	:	

JURISDICTIONAL STATEMENT

(a) State of Louisiana v. Billy J. Taylor, 282 So. 2d 491 (1973).

(b) (i) Appeal from the final judgment of the Supreme Court of the State of Louisiana affirming the conviction and sentence to life imprisonment of Billy J. Taylor for the crime of aggravated kidnappying (LSA-R.S. 14:44).

(ii) Date of original judgment -- January 15, 1973.

Date of judgment on rehearing -- August 20, 1973.

Date of order refusing second application for rehearing -- September 6, 1973.

Date of entry of judgment -- September 5, 1973.

Date notice of appeal filed -- November 8, 1973.

(iii) Jurisdiction of this appeal is conferred by 28 U.S.C. Sec. 1257 (2).

(iv) Cases sustaining jurisdiction -- Peters v. Kiff, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83; Carter v. Jury Com'r, 396 U.S. 320 , 90 S. Ct. 518, 24 L. Ed. 2d549; Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L. Ed. 84; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 315 U.S. 60; Thiel v. Southern Pacific, 328 U.S. 217, 66 S.Ct. 984, 220 L. Ed. 1181, 166 A.L.R. 1412; Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed 2d446; Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776; Ballard v. United States, 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181; Alexander v. Louisiana, 31 L. Ed. 2d 536.

(v) West's LSA Code of Criminal Procedure, Article 4021; Vol. 1, page 324: "A woman shall not

be selected for jury service unless she has previously filed with the Clerk of Court of the Parish in which she resides a written declaration of her desire to be subject to jury service."

West's LSA Constitution, Article 7, Section 41, Vol. 2, page 382: "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the Clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

(c) The question presented by the appeal is:

1) Whether Louisiana Code of Criminal Procedure Article 402 and Louisiana Constitution Article 7, Section 41, which exempt women from jury service violates the Sixth and Fourteenth Amendments to the United States Constitution.

2) Has appellant been deprived of a fair trial within the guarantees of the Sixth and Fourteenth Amendments to the United States Constitution by reason of the systematic exclusion of women from the jury (as shown by the all-male jury venire list) under the provisions of Louisiana Code of Criminal Procedure Article 402 and Louisiana Constitution Article 7, Section 41?

(d) The appellant was convicted of aggravated kidnapping (which included aggravated rape as part of the evidence introduced) by an all male jury selected from an all male jury venire. He was initially sentenced to death, but ultimately to life imprisonment. A motion to quash the jury venire was initially filed prior to the commencement of trial on the grounds that the systematic exclusion of women from the jury under the provisions of Louisiana Code of Criminal Procedure Article 402 and Louisiana Constitution Article 7, Section 41 was violative of the United States Constitutional guarantees of a fair trial and due process. This motion to quash was overruled by the Trial Judge. On appeal to the Louisiana Supreme Court the same objection was urged by assignment of error and argument in brief. The Louisiana Supreme Court affirmed the conviction but Justice Barham in a dissenting opinion agreed that the Louisiana Statutory and Constitutional provisions exempting women from jury service violates the Sixth and Fourteenth amendments of the United States Constitution. In appellant's first application for rehearing the question was again urged but in the Court's opinion on rehearing was disregarded except by Justice Barham who adhered to his original dissent.

(e) It is submitted that the question of the constitutionality of a state law which exempts women from jury service arising as it does in a capital case, is obviously a substantial federal question. The question is ripe for a final determination by the United States Supreme Court. In the instant case the question must be answered in order to dispose of the appeal. It cannot be disposed of on other grounds as in Alexander v. Louisiana, cited infra.

William McM. King
WILLIAM McM. KING
Attorney for Appellant
P.O. Box 1029
Covington, Louisiana 70433

CERTIFICATE OF SERVICE

I, William McM. King, attorney of record, for Billy J. Taylor, appellant herein, depose and say that on the 12th day of November, 1973, I served a copy of the foregoing Jurisdictional Statement, on the District Attorney for the Parish of St. Tammany, W. W. Erwin, appellee herein, by mailing same herein to his office in the courthouse, Covington, Louisiana, and to William J. Guste, Jr., Attorney General of the State of Louisiana at his office in the Capitol Building, Baton Rouge, Louisiana.

All parties required to be served have been served.

WILLIAM McM. KING

SWORN TO AND SUBSCRIBED
before me this 12th day
of November, 1973.

NOTARY PUBLIC

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5744

BILLY J. TAYLOR,

Appellant,

—v.—

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF LOUISIANA

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RELEVANT DOCKET ENTRIES

1. 4/14/72—Motion to Quash Petit Jury Venire
2. 4/14/72—Denial of Motion to Quash Petit Jury Venire
3. 1/15/73—Opinion and Judgment of the Supreme Court of Louisiana
4. 1/25/73—Application for Rehearing
5. 8/20/73—Opinion and Judgment of the Supreme Court of Louisiana on Rehearing
6. 8/30/73—Second Application for Rehearing
7. 9/ 6/73—Refusal of Second Application for Rehearing by the Louisiana Supreme Court

22ND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

Dy. Clerk: /s/ Joan S. Carite

Nos. 32,955, 56 & 57

STATE OF LOUISIANA

versus

BILLY J. TAYLOR

Filed: April 12, 1972

MOTION TO QUASH PETIT JURY VENIRE

On motion of Billy J. Taylor appearing herein through his undersigned counsel and on showing to the court that this matter has been set for trial on April 13, 1972, and on further showing to the Court that the Petit Jury Venire drawn to serve at the special criminal jury term of court beginning on Thursday, April 13, 1972 should be quashed for the reasons that said Petit Jury Venire systematically excluded women therefrom as shown by the certified copy of the original list of Jury Venire attached hereto and made part hereof, all in violation of the rights guaranteed to the defendant of a fair trial by jury of a representative segment of the community, and the deprivation of his right to life, liberty and property guaranteed to him and of the equal protection of the laws,

all of which are governed by the provisions of the Constitutions of the United States and the State of Louisiana.

NOW, THEREFORE, BE IT HEREBY ORDERED that the above motion to quash the Petit Jury Venire be and the same is hereby .

Covington, Louisiana this day of April, 1972.

Judge

/s/ William McM. King
WILLIAM MCM. KING
Attorney for Defendant-Mover
611 East Boston
Covington, Louisiana 70433

ST. TAMMANY PARISH, LOUISIANA
LIST OF PETIT JURORS DRAWN TO SERVE AT THE SPECIAL CRIMINAL JURY TERM OF COURT BEGINNING ON THURSDAY, APRIL 13th, 1972

No.	Name	Ward	No.	Name	Ward
1.	Jeffrey L. Abney	4	27.	Adrian J. Estopinal	3
2.	Julian Atlow	9	28.	Clenney A. Faciane	9
3.	Robert Lee Bailey	4	29.	Arthur D. Fauver	9
4.	Donald R. Barringer	9	30.	Meigs F. Fleming	9
5.	Bobby E. Berryfield	8	31.	Gerald Fowler	9
6.	George Washington Blackwell	6	32.	Clifton A. Frederick	1
7.	John E. Boehm, Jr.	4	33.	Founty B. Fussell	2
8.	Jake Brumfield	2	34.	Lionel Galatas	9
9.	Olen Bryant	9	35.	Troy Galloway	2
10.	Clarence E. Burkett	9	36.	Robert M. Gault	9
11.	Hollis M. Bynum	5	37.	Ellison T. Gordon, Sr.	3
12.	Charles E. Carroll	9	38.	Harvey Gregoire, Sr.	9
13.	George Casler	9	39.	Leonard J. Guarino	3
14.	Alvin Murvis Christy	3	40.	John T. Haaga	3
15.	Joe R. Clark	2	41.	Aubrey J. Holliday	4
16.	Norvil Claude	2	42.	William O. Hudspeth	9
17.	Ernest E. Cook	1	43.	Kenneth Jenkins	5
18.	Alfred Clyde	3	44.	Frank M. Johnson, Jr.	4
19.	James L. Core	2	45.	Horace L. Jones	8
20.	Levi Crawford	6	46.	Delos F. Kahl	6
21.	Rodger Crowe	8	47.	James Kennedy	6
22.	Glenn N. Curtis	9	48.	Elmer J. Klebba	4
23.	Carl B. Douglas	9	49.	W. Glen Knight	3
24.	Sterling J. Duracher	4	50.	Frank P. Lambke	4
25.	Charles A. Ebeyer	9	51.	William F. Levy	9
26.	Kenneth T. Erickson	4	52.	Frank J. Lovato	9

No.	Name	Ward	No.	Name	Ward
53.	James Loyd	2	77.	Alton Revere	3
54.	David D. Martin, Jr.	9	78.	Marshall E. Revere	3
55.	Warren J. Martin	10	79.	Reid Richardson	3
56.	Wallace Mayard	9	80.	Philip R. Rist	9
57.	Clarence F. Mizell	2	81.	Ludger J. Rome	9
58.	Willie J. Moore, Jr.	5	82.	John Ruffin	4
59.	Paul Morvant	1	83.	John Leveson	10
60.	Edward James Murphy	3	84.	Henry R. Schaller	3
61.	Lucius E. Murphy	1	85.	Charles E. Schroeter	4
62.	Roy W. McCoy	9	86.	Hezzie B. Sharp	2
63.	Glen McFarland	9	87.	Quentin T. Smith	4
64.	Robert J. Newell	9	88.	Terrence P. Smith	8
65.	Harold D. Nivens	9	89.	Walter L. Smith	8
66.	Ulysses Ordogne	7	90.	Andrew C. Spiehler, Jr.	8
67.	Ernest Paige	9	91.	Hiram Stein	1
68.	Nathan E. Paige	2	92.	Philip John Swett, Jr.	3
69.	Northwestern Penn	3	93.	Medreth Eugene	5
70.	Eddie E. Penton	5	94.	Edwin B. Underwood	9
71.	Philip M. Perilloux	1	95.	Donald Vesco	9
72.	Walter Pichon	9	96.	Daniel H. Walsh	1
73.	Sylvest Pierre	2	97.	William J. Wanner	3
74.	Clifford C. Powell	4	98.	John R. White, Jr.	8
75.	Walter E. Pulling	3	99.	Eli Whorley	9
76.	L. M. Rayner	6	100.	Camille H. Zeringue	4

STATE OF LOUISIANA
PARISH OF ST. TAMMANY

I hereby certify the above to be a true copy of the original list of Jury Venire drawn by the St. Tammany Parish Jury Commission on February 28th, 1972.

Covington, Louisiana, this 13th day of March, A.D., 1972.

/s/ Joan S. Carite
Clerk of Court

ST. TAMMANY PARISH, LOUISIANA
LIST OF PETIT JURORS DRAWN TO SERVE AT THE SPECIAL CRIMINAL JURY TERM OF COURT, BEGINNING ON THURSDAY, APRIL 13TH, 1972 AT 1:00 P.M.

No.	Name	Ward
1.	Edward Middleton Adams	4
2.	Duncan E. Barnes	1
3.	Elroy Bates	9
4.	Garland M. Beaujeaux	4
5.	Harold A. Bigner	7
6.	George Blackwell	6
7.	David G. Bonner	6
8.	Eric M. Bradshaw	3
9.	Rondall R. Brickhouse	9
10.	James Brown, Jr.	2
11.	Russell L. Bruhl	2
12.	Edmond R. Charbonnet	3
13.	Archie Craddock, Jr.	6
14.	William E. Couret, Sr.	7
15.	Robert E. Cox	3
16.	Luke Davis, Jr.	5
17.	Raymond P. Davis	6
18.	Joe Tate Evans	3
19.	James H. Folks	3
20.	E. C. Fortenberry	7
21.	Andre Louis Frosch	4
22.	George A. Gentry, Sr.	9
23.	Benny J. Gough	3
24.	Gilbert M. Graf	8
25.	Steve Gray	1
26.	Emmet Charles Guderian, Jr.	3
27.	Elmo J. Hahn	4
28.	Otto W. Haldenwanger	4
29.	Thomas F. Hankins	9
30.	Arnold Hano	4
31.	Emanuel S. Harrison	8
32.	John H. Hart	4
33.	Gerry E. Hinton	9
34.	Albert Hyma, Jr.	9
35.	Kenzie Jenkins, Jr.	2
36.	Frank C. Jordan	10
37.	Davis P. Jumonville, Sr.	10
38.	Alfred Laine, Jr.	9
39.	Joseph Samuel Laird	3
40.	Charles Laurent	9
41.	Leland A. Lester	3
42.	Robert C. Lewis, III	8
43.	Alvin E. Livingston	8
44.	Kenneth E. Masters	3
45.	Lawrence G. Mendel	1
46.	Emile Miller, Sr.	4
47.	Emile James Miller, Jr.	4
48.	Karl E. Mire	9
49.	Dan Cecil Mizell	5
50.	Merle T. Monroe	8
51.	Jesse Montagne	3
52.	Arthur J. Montgomery, Jr.	3
53.	Joseph R. Moran	4

No.	Name	Ward
54.	Benjamin A. Murray	9
55.	Edgar P. Nors	9
56.	Burl M. Oglesby	9
57.	Walter B. Orman, III	9
58.	Joseph E. Perea	1
59.	Harry Quaid	4
60.	Calvin Rayburn	6
61.	Raymond Renkiewicz	9
62.	Stephen W. Rohrbough	4
63.	Charles A. Rougon	9
64.	Malcolm J. Rouquette	4
65.	Perry W. Samrow	9
66.	Clyde D. Santifer	9
67.	Ralph E. Sharp	9
68.	David R. Saucer	9
69.	Lawrence J. Scardina	4
70.	Dorman C. Thomas	9
71.	John Walter Tisdale	3
72.	Homer J. Wallace	4
73.	Henry L. Williams	9
74.	Clifford L. Young	9
75.	Joseph F. Wood	8

STATE OF LOUISIANA
PARISH OF ST. TAMMANY

I hereby certify the above to be a true copy of the original list of Jury Venire drawn by the St. Tammany Parish Jury Commission on April 11, 1972.

Covington, Louisiana, this 11th day of April A.D., 1972.

/s/ Joan S. Carite
Clerk of Court

SUPREME COURT OF LOUISIANA

No. 52,844

STATE OF LOUISIANA

vs.

BILLY J. TAYLOR

On Appeal from the Twenty-Second Judicial District Court for the Parish of St. Tammany, State of Louisiana.
Honorable Thomas W. Tanner, Judge.

Filed Monday, Jan. 15, 1973

HAMLIN, Chief Justice:

Defendant appeals from his conviction and sentence to death for the crime of aggravated kidnapping, LSA-R.S. 14:44.[1]

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[1] "Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

"(1) The forcible seizing and carrying of any person from one place to another; or

"(2) The enticing or persuading of any person to go from one place to another; or

"(3) The imprisoning or forcible secreting of any person.

"Whoever commits the crime of aggravated kidnapping shall be punished by death; provided that if the kidnapped person is liberated unharmed before sentence is imposed then the sentence of death shall not be given but the offender shall be sentenced to life imprisonment at hard labor."

LSA-R.S. 14:44.

During the course of the proceedings a number of bills of exceptions were reserved, some of which are not now urged for our consideration. Defense counsel sets forth in his brief a specification of errors; the bills of exceptions which we shall consider fall under the following errors assigned:

"1

"The trial judge erred in upholding the prosector's challenges for cause of prospective jurors who expressed scruples against capital punishment.

"2

"The trial judge erred in overruling the objections of the defendant to the prosecutor's questioning of prospective jurors regarding their reaction to evidence of aggravated rape and armed robbery which he anticipated proving during the trial.

"3

"The trial judge erred in denying defendant's challenge for cause of prospective juror who had been for at least ten years a close friend and immediate neighbor to the persons injured by the alleged crime and their family.

"4

"The trial judge erred in upholding the prosecutor's objection to the introduction by defendant of the certified records of the Charity Hospital in New Orleans and East Louisiana Hospital in Jackson pertaining to defendant.

"5

"The trial judge erred in denying defendant's motion to quash the petit jury venire on the grounds that it systematically excluded women therefrom.

"6

"The trial judge erred in denying defendant's motions in arrest of judgment and for a new trial on the grounds that the imposition and carrying out of the sentence of death constitutes cruel and unusual punishment."

BILL OF EXCEPTIONS NO. 1

This bill of exceptions has been abandoned.

BILL OF EXCEPTIONS NO. 2

This bill of exceptions has been abandoned.

BILL OF EXCEPTIONS NO. 3

Bill of Exceptions No. 3 was reserved to the ruling of the trial judge which upheld the State's challenges for cause, over the objection of defense counsel, of certain enumerated jurors who expressed their opposition to capital punishment.

The issue raised in this bill is now moot because of the ruling of the United States Supreme Court with respect to the death sentence in the case of Furman v. Georgia, —— U.S. ——, 92 S. Ct. 2726, 33 L.Ed.2d 346.

BILLS OF EXCEPTIONS NOS. 4 AND 5

Bills of Exceptions No. 4 and 5 were reserved when the trial judge overruled defense counsel's objections to the following questions propounded by the State to prospective jurors Camille H. Zeringue and Kenneth T. Erickson:

"In other words, let me pose a hypothetical situation. If you were sitting on a jury and the State proved beyond a reasonable doubt to your satisfaction that a defendant, whose guilt or innocence you must decide, had kidnapped a lady, two ladies and a child, and during the course of that kidnapping had robbed them of their money at the point of a knife, and during the course of that kidnapping had in fact at the point of a knife committed the crime of aggravated rape, if you are satisfied with the evidence and the circumstances surrounding it in that factual situation, could you render an opinion of guilty as charged?" (The above question was propounded to prospective juror Zeringue.)

"Then if you are satisfied in the trial of the situation where the State presented it to you a kidnapping case which involves not only kidnapping but the facts and

circumstances showed, during the course of the trial, that during the kidnapping the Defendant committed the crime of aggravated rape upon one of the victims and at the same time robbed them of their money before they were liberated, then you could return a verdict of guilty in that possible situation?" (The above question was propounded to prospective juror Erickson.)

Defense counsel contends that in effect the district attorney by means of the above questioning was trying to commit the prospective jurors' vote in advance. He argues that such questioning does not advance the legitimate goal of testing possible bias, and it is clearly improper.

An examination of the record reveals that neither Camille H. Zeringue nor Kenneth T. Erickson served as jurors in this prosecution. Although the trial court overruled defense counsel's objections to the above propounded questions, he excused both prospective jurors from service. Under such circumstances, we find that the defendant suffered no prejudice, and there is no need for us to pass on his counsel's contentions.

Bills of Exceptions Nos. 4 and 5 are without merit.

BILL OF EXCEPTIONS NO. 6

This bill of exceptions has been abandoned.

BILL OF EXCEPTIONS NO. 7

This bill of exceptions has been abandoned.

BILL OF EXCEPTIONS NO. 8

Bill of Exceptions No. 8 was reserved to the ruling of the trial judge which denied defense counsel's challenge for cause of prospective juror Warren Martin on the ground that he had been for the ten years preceding trial a close friend of the victims of the crime and their family, and for that length of time lived across the street from them.

Defense counsel contends that the trial judge committed gross error in denying his challenge for cause, Art. 797, LSA-C. Cr. P., and that it is impossible to imagine that Martin would have been uninfluenced by his relationship.

An examination of the record reveals that prospective juror Warren Martin did not serve as a juror in this prosecution. Although defense counsel challenged the prospective juror for cause, he has not shown that defendant suffered any prejudice from an exhaustion of peremptory challenges. The record discloses that after defense counsel reserved a bill of exceptions to the instant ruling, the trial court immediately excused prospective juror Martin. Under such circumstances, defendant suffered no prejudice, and there is no need for us to pass upon his counsel's contentions.

Bill of Exceptions No. 8 is without merit.

BILL OF EXCEPTIONS NO. 9

Bill of Exceptions No. 9 was reserved when the trial judge refused to allow the introduction and filing in evidence in globo of the certified records of Charity Hospital in New Orleans and East Louisiana Hospital in Jackson, said records pertaining to the condition of the defendant.

Defense counsel contends that the trial judge clearly erred in not following the plain provisions of LSA-R. S. 13:3714 and not considering that the statute was an exception to the hearsay rule. He urges that the error substantially affected defendant inasmuch as defendant pleaded not guilty by reason of insanity, and the records sought to be admitted related to that defense.

LSA-R.S. 13:3714 provides:

> "Whenever a certified copy of the chart or record of any hospital in this state, signed by the director, assistant director, superintendent or secretary-treasurer of the board of administrators of the hospital in question, is offered in evidence in any court of competent jurisdiction, it shall be received in evidence by such court as prima facie proof of its contents, provided that the party against whom the record is sought to be used may summon and examine those making the original of said record as witnesses under cross-examination."

Defendant pleaded not guilty by reason of insanity at the time of the commission of the offense and present

incapacity. A lunacy commission was appointed, and a lunacy hearing was held on defendant's plea of *present* incapacity to proceed. The plea was denied, the trial judge stating: "I realize you have medical records out, but for the record you can complete the record, the Court at this time is going to rule the man is really sane and able to assist. I have no evidence that would change my mind." [2]

The plea of not guilty by reason of insanity at the time of the commission of the offense was a matter for the jury to decide. Defense counsel attempted to offer the hospital records for the purpose of substantiating the plea. The State argued:

> "Your Honor, first of all, the medical records in a criminal case themselves constitute an opinion or medical testimony as general, and opinion of a medical except general, a doctor, as to the condition of a person's mind.
>
> "Second of all, the best evidence is the doctor himself.
>
> "In the third place, with regard to the records themselves, they are run through with hearsay evidence. They are run through with evidence that is self-serving in that many times the statements of the patient, many times letters, writings, or many kinds of documents are contained, and it is absolutely improper for all totally hearsay records to be introduced in a criminal case.
>
> "If the doctor accepts the medical records as valid and forms an opinion based upon it, without telling where he got his information, if that is satisfied, then he can

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[2] In brief, counsel for the defendant avers:

"ARGUMENT

"BILL OF EXCEPTION NO. 1

"This bill was reserved to the ruling of the trial judge denying defendant's plea of present incapacity to proceed.

"However, in view of the unanimous opinion of sanity expressed by the members of the sanity commission in their report and under examination and the Supreme Court's great reluctance to disturb such determinations of the trial judge, no useful purpose would be served in presenting argument on this bill."

give his opinion. But certainly the jury nor the Court should be burdened with all the hearsay that is introduced into the record, and it is not admissible."

As stated supra, the trial judge refused to admit defendant's hospital records in evidence in globo; the following colloquy took place between him and defense counsel:

"BY THE COURT:

"Mr. King, I am inclined to agree with the State on this. We have reams of records out there, and you could have a doctor examine this man and have a possible diagnosis such as this doctor has done which could possibly be changed at a later date by another doctor or by this doctor himself.

"BY MR. KING:

"I realize that.

"BY THE COURT:

"And I am just reluctant to let all this come in and burden this jury, should they decided to look at all the documents in this case and go into that record.

"I'm sure the only one competent to testify out of that record is the doctor that is on the stand now or possibly other doctors that you might have.

"BY MR. KING:

"I realize that, and I realize sincerely what Mr. Mercer said.

"BY THE COURT:

"I will do this. I am not going to allow you to introduce that whole record. You can let this doctor or any other doctors examine the record and testify as to their opinion, as to what's contained therein, and they can use that as a basis for their opinions.

"BY MR. KING:

"Your Honor, if I did that, I would have to subpoena one hundred different people, and I can't do that.

"BY THE COURT:

"But what I am telling you, Mr. King, is I believe you could do this: that this doctor has testified already that he has examined this record and has gone over this record with the Defendant.

"Now, if you have any questions that you would like to ask this doctor based on the facts brought out in that record, then I am willing to let you examine him about that.

"BY MR. KING:

"Very well.

"BY THE COURT:

"As long as he testifies in this Court that, based on the information he has obtained from the Defendant himself or from the record that he can give his opinion.

"BY MR. KING:

"I have finished with Doctor DeVillier, as far as his questioning, but I do believe that the law is very clear on my being able to introduce this, since there is no objection to its proper certification, and I will reserve, of course, a Bill to that."

We have read the forensic letters and reports concerning the defendant which were submitted on the question of present insanity. They are complicated and involved; we agree with the trial judge that any hospital records concerning the defendant would be detailed and voluminous. We also agree with the trial judge that a person's condition is subject to change, and a record reflecting a condition at one time would not necessarily reflect a condition at a later date.

In the case of State v. O'Brien, 255 La. 704, 232 So.2d 484, we held that the right conferred under LSA-R.S. 13:3714 was to be regarded as an exception to the hearsay rule, and that the statute did not violate a person's right of confrontation. However, under the facts and circumstances of this case, we do not think that hearsay is our concern. Three doctors testified as to their eval-

uations of the defendant; they also testified as to the dates of such evaluations; they were allowed to refer to hospital records if they chose to do so. This testimony was heard by the jury; it considered this expert testimony in considering the plea of not guilty by reason of insanity at the time of the commission of the offense. We therefore conclude that the trial judge did not abuse his discretion or commit prejudicial reversible error in not allowing defense counsel to introduce in evidence in globo voluminous hospital records covering a great number of confinements of defendant in the State's hospitals. Under the instant facts and circumstances, the medical testimony was the best evidence. LSA-R.S. 15:436.

Bill of Exceptions No. 9 is without merit.

BILL OF EXCEPTIONS NO. 10

Bill of Exceptions No. 10 was reserved to the trial judge's denial of defense counsel's motion to quash the petit jury venire, such motion being grounded on the fact that women were systematically excluded from the petit jury venire.

Counsel urges that the absolute exemption provided by Louisiana is present in no other state. He says that it is not reasonable to expect volunteers for jury service, and jury selection cannot be constitutionally grounded upon a voluntary procedure for one sex.

The matter urged in this bill has been considered by this Court many times, and each time that we have considered the contention, we have held that our law, which permits the calling for jury service only those women who have filed with the clerk of court a written declaration of their desire to be subject to jury service is neither irrational nor discriminatory. See, State v. Daniels, —— La. ——, 263 So.2d 859 (1972); State v. Curry, —— La. ——, 263 S.2d 36 (1972); State v. Millsap, 258 La. 883, 248 So.2d 324 (1971); State v. Pratt, 255 La. 919, 233 So.2d 883 (1970); State v. Comeaux, 252 La. 481, 211 So.2d 620 (1968).

The contentions urged by defense counsel have been considered by the United States Supreme Court in the

case of Hoyt v. State of Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961) and determined adversely to defendant. The Court stated at pp. 162 and 163 of 82 S.Ct. that:

> "In neither respect can we conclude that Florida's statute is not 'based on some reasonable classification,' and that is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.
>
> "Florida is not alone in so concluding Women are now eligible for jury service in all but three States of the Union. Of the forty-seven States where women are eligible, seventeen besides Florida, as well as the District of Columbia, have accorded women an absolute exemption based solely on their sex, exercisable in one form or another. In two of these States, as in Florida, the exemption is automatic, unless a woman volunteers for such service. * * *" Cf. Eslinger v. Thomas, 340 F. Supp. 886 (1972).

We conclude that under the jurisprudence of this Court and the above ruling of the United States Supreme Court, Art. VII, Sec. 41, La. Const. of 1921, and Art. 402, LSA-C.Cr.P. are constitutional.

Defendant has shown no prejudice. He has offered no evidence of purposeful exclusion of women from the instant grand jury and petit jury; he has made no showing that the present law was not followed. Under such circumstances, we find no error in the ruling of the trial judge.

BILL OF EXCEPTIONS NO. 11

Bill of Exceptions No. 11 was reserved when the trial judge denied defense counsel's motions in arrest of judgment and for a new trial.

The motion for a new trial presents nothing new for our consideration. Matters urged were considered in our determination of the bills of exceptions presented supra.

The motion in arrest of judgment attacks the imposition of the death penalty as cruel and unusual punishment.

At the present time, the mandate of the United States Supreme Court in the case of Furman v. Georgia, —— U.S. ——, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), requires the imposition of a sentence other than death. The motion in arrest of judgment is therefore with merit insofar as it attacks the death penalty imposed upon defendant.

For the reasons assigned, the conviction is affirmed; the death sentence imposed upon defendant is annulled and set aside, and the case is remanded to the Twenty-Second Judicial District Court with instructions to the trial judge to sentence the defendant to life imprisonment.

STATE OF LOUISIANA

No. 52,844

STATE OF LOUISANA

versus

BILLY J. TAYLOR

On Appeal from the Twenty-Second Judicial District Court, Parish of St. Tammany; Honorable Thomas W. Tanner, District Judge, Presiding.

• • •

CONCURRING OPINION

TATE, Justice.

As to Bill No. 9, I concur in result only. As I read the record, the defendant was not denied the right to introduce relevant parts of the Charity Hospital record.

• • •

SUPREME COURT OF LOUISIANA

No. 52844

STATE OF LOUISIANA

versus

BILLY J. TAYLOR

BARHAM, Justice, Dissenting.

Bill of Exceptions No. 10.

The defendant moved to quash the petit jury venire as being improperly drawn, selected, and constituted since women were systematically excluded. I am of the opinion that Code of Criminal Procedure Article 402 and Louisiana Constitution Article VII, Section 41, which exempt women from jury service violate the Fourteenth and Sixth Amendments to the United Sttaes Constitution, and that therefore the motion to quash the venire was good. See Peters v. Kiff, —— U.S. ——, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).

Bills of Exceptions Nos. 4 and 5.

The State was allowed to propound and receive answers of commitment or pre-judgment to the following questions to two prospective jurors. To prospective juror Zeringue: "In other words, let me pose *a hypothetical situation*. If you were sitting on a jury and the State proved beyond a reasonable doubt to your satisfaction that a defendant, whose guilt or innocence you must decide, had kidnapped a lady, two ladies and a child, and during the course of that kidnapping had robbed them of their money at the point of a knife, and during the course of that kidnapping had in fact at the point of a knife committed the crime of aggravated rape, if you are satisfied with the evidence and the circumstances surrounding it in that factual situation, could you render an opinion of guilty as charged?" (Emphasis here and elsewhere supplied.) To prospective juror Erickson: "Then if you are satisfied in the trial of the situation where the State presented it to you a kidnapping case which involves not only kidnapping but the facts and circumstances showed, during the course of the trial, that during the kidnapping the Defendant committed the crime of aggravated rape upon one of the victims and at the same time robbed them of their money before they were liberated, then you could return a verdict of guilty in that possible situation?"

This court, in a series of recent cases which I believe to be erroneous, has repeatedly refused *defendants* the right on voir dire examination to examine a juror for prejudice as to certain laws and rules of evidence. State v. Richey, 258 La. 1094, 249 So.2d 143 (1971); State v. Sheppard, —— La. ——, 268 So.2d 590 (1972); State v. Crittle, —— La. ——, 268 So.2d 604 (1972); State v. Bell, —— La. ——, 268 So.2d 610 (1972). I cautioned in dissent that the court was applying one rule of law to *defendants'* voir dire examination of prospective jurors and another rule of law to the State's voir dire examination. See dissent in State v. Richey, supra and the cases there cited: State v. Frier, 45 La.Ann. 1434, 14 So. 296; State v. Barker, 46 La.Ann. 798, 15 So. 98; State v. Stephens, 116 La. 36, 40 So. 523.

In the case at hand we again apply a harsh standard to the defendant and a lenient standard to the State when voir dire examination involves hypothetical questions by the State calling for pre-judgment of the guilt or innocence of the defendant. State v. Richey, supra, cited State v. Smith, 216 La. 1041, 45 So.2d 617, from which it quoted the following language: "Moreover, *hypothetical questions* and questions of law are not permitted in the examination of jurors which call for a *pre-judgment* of any supposed case on the facts." See also State v. Henry, 197 La. 999, 3 So.2d 104. In State v. Smith and State v. Henry the convictions were reversed because the State had been allowed to ask hypothetical questions which called for pre-commitment by the jurors. In Smith, which was a trial for murder, this court held the following questions propounded by the State to prospective

jurors to be improper, prejudicial, and reversible error: "You would not inflict capital punishment, even if he raped you own daughter?" Do you have conscientious scruples agains capital punishment "even in the case of rape"?

In Henry the State's questions which were found to constitute reversible error where designed to commit the jurors in advance to reach a certain verdict if the testimony convinced them that the accused was guilty of the crime of murder. The court held that although the State was entitled to determine whether a juror *could* render a verdict which would carry the death penalty, it was highly improper to ask jurors "whether under like circumstances they *would* render such a verdict".

In State v. Scott, 198 La. 162, 3 So.2d 545, and in State v. Plummer, 153 La. 730, 96 So. 548, the court applied the same rule of law to the defendants, affirming the convictions where defendants were refused permission to determine from jurors the verdicts which would be returned under certain circumstances. In all of these cases a correct rule of law was enunciated and applied evenhandedly to the accused and to the State.

A casual observation of the questions posed to the prospective jurors Zeringue and Erickson in this case must lead one to conclude that they are far more improper and prejudicial than the questioning condemned in Smith, Henry, Scott, and Plummer. The first question is prefaced with the remark that it is a hypothet. It projects a possible set of facts and asks for an opinion of guilt under those facts. The second question also poses an assumed set of facts and asks for a commitment as to verdict "in that possible situation". Such questioning is to be condemned whether by the State or by the defendant. It is improper voir dire examination. Undeviatingly we have held it to be so. Even in the recent cases with which I disagree, the rule of law was reannounced that hypothetical questions calling for commitment to verdict are improper.

The majority says it will not pass upon counsel's contentions that the overruling of the objections to such questioning was reversible error since neither of the jurors served in the trial. Where the majority errs, and

badly, is in finding that the court excused these jurors from service. These jurors did not serve because *defense counsel per emptorily challenged both of them.*

Code of Criminal Procedure Article 800, which requires the exhaustion of peremptory challenges before the defendant can question rulings on challenges for cause, is inapplicable to the case at hand, which does not involve challenge for cause. See dissent in State v. Cormier, No. 52243 on our docket, decided January 9, 1972. But even if Article 800 were sought as a tool for denying this defendant review of the issue presented, it would avail nothing here, for the defendant did exhaust all of his peremptory challenges. Our Article 800 purposely overruled State v. Breedlove, 199 La. 965, 7 So.2d 221 (1942), which required that a defendant who had exhausted his peremptory challenges must in addition show that he was forced to accept an obnoxious juror before a ruling on challenge for cause could be examined on review. See Official Revision Comment to that article.

Here the defendant was forced to challenge two jurors who had committed themselves to verdicts of guilty before hearing the evidence under assumed statements of facts given them by the State. The defendant was forced to exercise peremptory challenges to rid the jury of two jurors who had prejudged the case; he exhausted his other challenges; he was prejudiced. Specifically, under State v. Smith and State v. Henry, both cited above, as well as under the other jurisprudence, the defendant here is entitled to a reversal.

I respectfully dissent.

SUPREME COURT OF LOUISIANA

No. 52844

STATE OF LOUISIANA

versus

BILLY J. TAYLOR

Appeal from the Twenty-Second Judicial District Court
for the Parish of St. Tammany,
Thomas W. Tanner, Judge

APPLICATION FOR REHEARING ON
BEHALF OF BILLY J. TAYLOR,
DEFENDANT-APPELLANT

WILLIAM McM. KING
Attorney for Appellant
611 East Boston Street
P. O. Box 1029
Covington, Louisiana 70433

TO THE HONORABLE, THE SUPREME COURT OF LOUISIANA:

The defendant Billy J. Taylor, represented by the undersigned counsel respectfully represents:

I

On January 15, 1973 this Honorable Court affirmed the conviction of petitioner and annulled and set aside the death sentence remanding to the 22nd Judicial District Court with instructions to the Trial Judge to sentence the defendant to life imprisonment.

II

It is respectfully urged that a rehearing should be granted in this case for the following reasons:

(a) This court in its ruling on bills of exceptions #4 and 5, found that since both prospective jurors were excused no prejudice was suffered by the defendant. However, it is submitted that prejudice was suffered by the defendant since he used up all of his peremptory challenges. *State* vs *Smith*, 216 La. 1041, 45 So.2nd 617.

(b) In ruling on bill of exceptions #8, this court found that the defendant suffered no prejudice since prospective juror Martin did not serve as a juror. However, defendant was forced to use a peremptory challenge to accomplish this and used all of his peremptory challenges before the jury was selected. Therefore, prejudice was suffered by the defendant.

(c) In ruling on bill of exceptions #9, this court found that the defendant suffered no prejudice by not being able to introduce in evidence certified copies of the Charity Hospital of East Louisiana hospital records under the provisions of LSA R.S. 13:3714. However, in view of the specified plea of not guilty and not guilty by reason of insanity, and the very plain provisions of LSA-R.S. 13:3714, the defendant was bound to be prejudiced by his inability to introduce certain hospital records pertaining to his incarceration in mental institutions and other institutions relating to his mental condition.

(d) In ruling on bill of exceptions #10, this court found that the provisions of Article VII, Sec. 41 of the Louisiana Constitution of 1921 and Article 402, LSA Code of Criminal Procedure providing for an automatic exemption for women unless women volunteer for jury service, does not violate the United States Constitution. However, the opinion of the court does not consider the recent decision of the United States Supreme Court, *Peters* vs. *Kiff*, 92 S.Ct. 2163, 33 L.Ed. 2d 83 (1972), and the other decision of the United States Supreme Court that the exclusion from jury service of a meaningful section of society violates constitutional guarantees to a fair and impartial jury.

WHEREFORE, petitioner prays that a rehearing in this case be granted.

Respectfully submitted

/s/ William McM. King
WILLIAM MCM. KING
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611 E. Boston (P.O. Bx. 1029)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Application for Rehearing was served on the Assistant District Attorney for the Parish of St. Tammany, State of La., Max Mercer, by placing a copy of same in the U.S. Mail, postage prepaid, to his office at 2254—1st, Slidell, La.

Covington, Louisiana this 25 day of January, 1973.

/s/ William McM. King
WILLIAM MCM. KING

SUPREME COURT OF LOUISIANA

No. 52,844

[Monday Aug. 20, 1973]

STATE OF LOUISIANA

v.

BILLY J. TAYLOR

ON REHEARING

SANDERS, Chief Justice.

We granted a rehearing in this matter to reconsider Bills of Exceptions Nos. 4, 5, 8 and 9, which raise substantial legal questions relating to the validity of the conviction.

The Grand Jury of St. Tammany Parish indicted Billy J. Taylor for aggravated kidnapping in violation of LSA-R.S. 14:44. The State's theory of the case was that Taylor, while armed with a butcher knife, approached an automobile occupied by Mrs. Louise Willie, her daughter, and grandson. By threatening them, he forced Mrs. Willie to drive him from the City of Covington to an abandoned road near Mandeville. There he raped her. He released the victims only after he had taken their money and they had promised not to report the incident to the law enforcement officers.

Bills of Exceptions Nos. 4 and 5 were reserved when the trial judge overruled defense objections to the State's questions to two jurors on *voir dire* examination. The first question was directed to prospective juror Camille H. Zeringue as follows:

> "In other words, let me pose a hypothetical situation. If you were sitting on a jury and the State proved beyond a reasonable doubt to your satisfaction that a defendant, whose guilt or innocence you

must decide, had kidnapped a lady, two ladies and a child, and during the course of that kidnapping had robbed them of their money at the point of a knife, and during the course of that kidnapping had in fact at the point of a knife committed the crime of aggravated rape, if you are satisfied with the evidence and the circumstances surrounding it in that factual situation, *could* you render an opinion of guilty as charged?" (Italics ours).

The next question was addressed to prospective juror Kenneth T. Erickson as follows:

"Then if you are satisfied in the trial of the situation where the State presented it to you a kidnapping case which involves not only kidnapping but the facts and circumstances showed, during the course of the trial, that during the kidnapping the Defendant committed the crime of aggravated rape upon one of the victims and at the same time robbed them of their money before they were liberated, then you *could* return a verdict of guilty in that possible situation?" (Italics ours).

The record reflects that neither prospective juror served at the trial, both being the subject of a preemptory challenge by the defense.

The defense contends that the questions were improper since they committed the prospective juror's vote in advance of the hearing of evidence.

It is, of course, improper to ask a prospective juror what his verdict *would* be on an assumed state of facts. Such a question seeks to commit the juror to a specific verdict in advance of trial. State v. Plummer, 153 La. 730, 96 So. 548 (1923); State v. Henry, 197 La. 999, 3 So.2d 104 (1941); 5 Wharton's Criminal Law and Procedure (Anderson 1957), § 1996, pp. 130-131.

The question addressed to the prospective jurors here, however, was not whether they *would* return a specific verdict, but whether, if the crime was proved, they *could* return a verdict of guilty. Such a question seeks no commitment but tests the impartiality of the juror. See LSA-C Cr.P. Art. 797.

In State v. Henry, supra, this distinction is made:

"If the district attorney had gone no further than to ask the veniremen whether, in case they were convinced from the evidence that the accused was guilty of the charge brought against her, they *could* render a verdict which would carry with it the death penalty without offending their conscience, defendant's complaint would have no merit. But it was highly improper for him to go further and ask them whether under like circumstances they *would* render such a verdict. By answering that question in the affirmative, as each of the jurors did, according to the record, the jurors, in effect, committed themselves in advance to the proposition that, if after hearing the evidence they were convinced that the defendant was guilty of the crime of murder and if in their opinion there were no mitigating circumstances entitling her to a qualified verdict, 'or mercy', they would render a verdict carrying with it capital punishment."

See also State v. Sercovich, 246 La. 503, 165 So.2d 301 (1964).

The use of the word "could" in *voir dire* questions similar to this has been criticized as lacking clarity. See State v. Weston, 232 La. 766, 95 So.2d 305 (1957), upholding the denial of a challenge for cause of the juror who answered the question. Nonetheless, in the usage of this *voir dire* examination, it conveys this meaning: If the State establishes the guilt of the defendant "beyond a reasonable doubt to your satisfaction", will your state of mind permit you to return a verdict of guilty in accordance with the evidence?

The trial judge is vested with broad discretion in regulating the *voir dire* examination of prospective jurors. State v. Coleman, 260 La. 897, 257 So. 2d 652 (1972); State v. Harper, 260 La. 715, 257 So.2d 381 (1972); State v. Schoonover, 252 La. 311, 211 So.2d 273 (1968), cert. den. 394 U.S. 931, 89 S.Ct. 1199, 22 L.Ed.2d 460; State v. Green, 244 La. 80, 150 So. 2d 571 (1963). His position at the trial permits him to promptly discern any

misunderstanding of questions on the part of a prospective juror. In our opinion, the State's questions are well within that discretion.

Assuming *arguendo* that the questions were improper as tending to commit the jurors in advance, as contended by defendant, no prejudice to the defendant resulted. See LSA-C.Cr. P. Art. 921; State v. Dreher, 166 La. 924, 118 So. 85 (1928), cert. den. 278 U.S. 641, 49 S.Ct. 36, 73 L.Ed. 556.

As noted in the majority opinion on original hearing, these two prospective jurors did not serve on the trial jury. No question addressed to them could have affected the verdict. See Henwood v. People (Colo.), 143 P. 373 (1914); 47 Am.Jur 2d, Jury, § 202, p. 792.

We conclude the bills of exceptions lack merit.

Bill of Exceptions No. 8 was reserved after the trial judge denied the defendant's challenge for cause of prospective juror Warren Martin, on the ground that he was a friend of the victims.

The defendant excused the juror with a preemptory challenge.

Article 797 of the Louisiana Code of Criminal Procedure provides:

> "The state or the defendant may challenge a juror for cause on the ground that:
>
> • • • •
>
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict; • • •"

Under the above provision, the test of a challenge for cause is whether the relationship of the prospective juror with the victims is such that it is reasonable to conclude that the relationship would influence him in arriving at a verdict and thus cause him to be biased against the defendant.

The trial court must determine from the *voir dire* examination, as a whole, whether the juror's state of

mind is such that it is reasonable to conclude that he would be unable to render impartial justice in the case. See State v. Atwood, 210 La. 537, 27 So.2d 324 (1946).

The prospective juror was a neighbor of both the defendant, Taylor, and of the victims. He had been a neighbor of the victims for about ten years. He classified them as "close friends".

He further testified:

> "MR. MERCER: Is there any reason, Mr. Martin, why because of that friendship that you would feel you could not serve as a fair and impartial juror?
> MR. MARTIN: No.
>
> • • • •
>
> "THE COURT: But do you feel that your relationship with the Willies would make you in any way partial to them in this matter?
> MR. MARTIN: No.
> THE COURT: Do you feel that you could be impartial to this Defendant throughout this trial regardless of what evidence comes before you?
> MR. MARTIN: Yes, sir."

The finding of the trial judge as to bias is entitled to great weight. The record, in our opinion, is inadequate to show an abuse of discretion. See State v. Brazile, 229 La. 600, 86 So.2d 268 (1956).

Bill of Exceptions No. 9 was reserved when the trial judge refused to allow the introduction in *globo* of the certified records of the New Orleans Charity Hospital and the East Louisiana State Hospital on the issue of the defendant's sanity.

An examination of the record shows that the trial judge was concerned about the size of the files offered and qualified his ruling so as to allow defense counsel to use them in the examination of physicians who testified.

Certified copies of hospital records are admissible in evidence as prima facie proof of their contents. LSA-R.S. 13:3714; State v. O'Brien, 255 La. 704, 232 So.2d 484 (1970). Hence, the trial judge committed technical error in disallowing the introduction of the records.

Physicians from both hospitals testified. Under the trial judge's qualified ruling, defense counsel freeely used the records in interrogating the witnesses, bringing to the attention of the jury the pertinent entries. Hence, we conclude no substantial prejudice resulted and that the error is not one that warrants the reversal of the conviction.

Article 921 of the Louisiana Code of Criminal Procedure provides:

> "A judgment or ruling shall not be reversed by an an appellate court on any ground unless in the opinion of the court after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

For the reasons assigned, the original judgment affirming the conviction and sentence is reinstated and made the final judgment of this Court.

SUPREME COURT OF THE UNITED STATES

No. 73-5744

BILLY J. TAYLOR, APPELLANT

v.

STATE OF LOUISIANA, APPELLEE

ORDER NOTING PROBABLE JURISDICTION

The motion of the appellant in No. 73-5744 for leave to proceed *in forma pauperis* is noted and the cases are set for oral argument in tandem.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 537753 229

IN THE

Supreme Court of the United States

No. 73-5744

STATE OF LOUISIANA

versus

BILLY J. TAYLOR

Appeal from the Supreme Court of the State of Louisiana

MOTION TO DISMISS

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22nd JUDICIAL DISTRICT

JULIAN J. RODRIGUE
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[illegible]

IN THE

Supreme Court of the United States

No. 73-5744

STATE OF LOUISIANA

versus

BILLY J. TAYLOR

Appeal from the Supreme Court of the State of Louisiana

MOTION TO DISMISS

MOTION TO DISMISS APPEAL

Now into Court comes the State of Louisiana, through the undersigned Assistant Attorney General of the State of Louisiana, and moves this Honorable Court to dismiss the appeal in the above numbered and entitled cause of action for the following reason, to-wit:

The sole question presented by defendant's appeal is the constitutionality of Article 7, Section 21 of the Constitution of the State of Louisiana and Article 402 of the Louisiana Code of Criminal Procedure.

Article 7, Section 41 of the Louisiana Constitution provides as follows:

> "The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the Clerk of the District Court a written declara-

> tion of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

Article 402 of the Code of Criminal Procedure further provides:

> "A woman shall not be selected for jury service unless she has previously filed with the Clerk of Court of the Parish in which she resides a written declaration of her desire to be subject to jury service."

These authorities provide a general exemption for women from jury service. Neither the Constitution nor the Code of Criminal Procedure purports to exclude women from jury service, but rather accords them the privilege to serve without imposing the duty to do so. Women may waive this privilege by simply filing with the Clerk of Court of the Parish in which they reside a written declaration of their desire to serve.

The following quotation from *Hoyt v. State of Florida*, 368 U.S. 57, 82 S.Ct. 159 (1961), shows that the Florida statute in question was almost identical to the Louisiana one in the case at bar. (At page 160)

> "The jury law primarily in question is Fla. Stat., 159, §40.01 (1), F.S.A. This Act, which requires that grand and petit jurors be taken from 'male and female' citizens of the State possessed of certain qualifications,[1] contains the following proviso:

> 'provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.'
>
> Showing that since the enactment of the statute only a minimal number of women has so registered, appellant challenges the constitutionality of the statute both on its face and as applied in this case. For reasons now to follow we decide that both contentions must be rejected."

The contention in the Florida case is the same as in the instant case, that the state statute works as an unconstitutional exclusion of women from jury service.

In upholding the constitutionality of the Florida statute this Court said:

> "Manifestly, Florida's §40.01 (1) does not purport to exclude women from state jury service. Rather, the Statute 'gives to women the privilege to serve but does not impose service as a duty'."

In view of this Court's decision in *Hoyt v. State of Florida*, supra, the Louisiana Constitutional and Codal provisions are not unconstitutional, defendant has not been deprived of a fair and impartial trial and this appeal should be dismissed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
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CERTIFICATE OF SERVICE

I, Walter Smith, Assistant Attorney General for the State of Louisiana, counsel for appellee herein, depose and say that on the ..... day of Janary, 1974, I served a copy of the foregoing motion to dismiss on counsel of record for the defendant, Billy J. Taylor, appellant herein, by mailing same herein to his post office box, P.O. Box 1029, Covington, Louisiana 70433.

All parties required to be served have been served.

_____

WALTER SMITH

Sworn to and subscribed
before me this _____
day of January, 1974.

_____

JULIAN J. RODRIGUE
NOTARY PUBLIC

Supreme Court, U. S.
FILED
MAY 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5744

BILLY J. TAYLOR,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF LOUISIANA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5744

BILLY J. TAYLOR,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF LOUISIANA

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 282 So. 2d 491 (1973).

JURISDICTION

On September 5, 1973 the Supreme Court of the State of Louisiana entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the United States was filed on November 8, 1973. The Jurisdictional Statement was filed on

November 13, 1973 and appellee's Motion to Dismiss was filed on January 25, 1974. Probable jurisdiction was noted on February 19, 1974. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §1257 (2).

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

La. Const. Art. VII, §41

The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. . . .

La. Code of Criminal Procedure, Art. 402

A woman shall not be selected for jury service unless she has previously filed with the clerk of court, of the parish in which she resides a written declaration of her desire to be subject to jury service.

QUESTIONS PRESENTED

1. Whether La. Const. Art. VII, §41 and La. Code of Criminal Procedure, Art. 402 in providing an automatic exemption for all women from jury service violate the Sixth and Fourteenth Amendments of the United States Constitution?

2. Whether appellant, a male, has been deprived of an impartial jury and fair trial within the guarantees of the Sixth and Fourteenth Amendments of the United States Constitution by reason of the systematic exclusion of women from the jury selection process governed by La. Const. Art. VII, §41 and La. Code of Criminal Procedure, Art. 402?

STATEMENT OF THE CASE

The appellant, a male, was convicted of aggravated kidnapping in 1972 by a jury in St. Tammany Parish, Louisiana selected from an all male 175 member jury venire. (App. p. 4-7). He was initially sentenced to death, but a motion in arrest of judgment was ultimately sustained by the state Supreme Court and the sentence was changed to life imprisonment. (App. p. 18).

A pre-trial motion to quash the petit jury venire was filed on the grounds that the systematic exclusion of women violated federal constitutional guarantees of a fair trial, due process and equal protection of the laws. (App. p. 2). The motion was denied and on appeal of appellant's conviction the same objection was urged by bill of exception and assignment of error. (App. p. 9 ¶5, p. 16 ¶10). The Louisiana Supreme Court affirmed the conviction. (App. p. 18). A dissenting opinion would have found that the automatic jury duty exemption for women provided by the state constitution and statute violates the Sixth and Fourteenth Amendments of the United States Constitution. (App. p. 20). The majority opinion held that "our law, which permits the calling for jury service only those women who have filed with the clerk of court a written declaration of their desire to be subject to jury service is neither irrational nor discriminatory", and cited the assumption in *Hoyt v. Florida,* 368 U.S. 57 (1961) that "woman is still regarded as the center of home and family life." (App. p. 17).

SUMMARY OF ARGUMENT

Louisiana laws prohibiting jury duty by women except to those who pre-register their desire to volunteer in effect systematically exclude women as a class and discernible segment of society. *Ballard v.*

United States, 329 U.S. 187 (1946). As a result appellant was deprived of his fundamental constitutional right to be tried by a jury selected from a representative cross section of the community, as guaranteed by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. No other specific injury or harm need be shown. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Peters v. Kiff*, 407 U.S. 493 (1972).

The legal and factual considerations which in 1961 prompted the Court in *Hoyt v. Florida*, supra, 368 U.S. 57 (1961), to uphold a similar statute are no longer relevant. *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Louisiana's statutory exemption for women cannot withstand the strict scrutiny required when it infringes appellant's fundamental constitutional right to be tried by an impartially chosen jury. *San Antonio Independant School District v. Rodriguez*, 411 U.S. 1, 17 (1973), or when it discriminates between the sexes. *Reed* and *Frontiero*, supra. Louisiana can show no compelling public interest for the exemption which would justify the violation of basic constitutional rights. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

ARGUMENT

I.

ARTICLE 402 OF THE LOUISIANA CODE OF CRIMINAL PROCEDURE AND SECTION 41 OF ARTICLE 7 OF THE LOUISIANA CONSTITUTION SYSTEMATICALLY EXCLUDE WOMEN AS A CLASS FROM JURY SERVICE.

Clearly, the automatic exemption granted to all women operates to exclude them from jury duty. Appellant was tried before a jury selected from a venire

numbering 175, not one of whom was a woman (App. p. 4-7). This happened in a judicial district where 53% of the population of persons eligible for jury service is female. Not over 10% of the persons in the jury wheel of the entire parish of St. Tammany are female. In the period December 8, 1971-December 4, 1972, only 13 women were included in a total of 1850 names drawn for petit jury terms. In Washington Parish, which together with St. Tammany comprise the Twenty-Second Judicial District, not more than two women have ever been known to volunteer for jury service and only once has a woman been actually included in a petit jury venire. (Stipulation of Facts, *Louisiana v. Healy*, No. 73-759, App. p. 83, 84).

II.

THE EXCLUSION OF WOMEN FROM JURY DUTY HAS VIOLATED APPELLANT'S RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS.

Due process demands that a jury be selected from a representative cross section of the community, *Smith v. Texas*, 311 U.S. 128, 139 (1941); *Peters v. Kiff*, supra, 407 U.S. 493 (1972), and the exclusion of a discernible class from jury service destroys the possibility that the jury will reflect the required cross section of the community, 407 U.S. at 500.

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion

> deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." 407 U.S. at 503, 504.

The Court has previously recognized women as a discernible class, whose systematic exclusion eliminates the possibility of an impartially selected jury. *Ballard v. United States*, 329 U.S. 187 (1946).

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. . . ." A "distinct quality is lost if either sex is excluded." 329 U.S. at 193, 194.

In *Peters*, supra, the Court was concerned with the standing of a white petitioner to attack a state court jury on the ground that the systematic exclusion of blacks denied him due process. The trial and conviction took place prior to *Duncan v. Louisiana*, 391 U.S. 145 (1968). The majority opinion in *Peters* acknowledged his standing to complain, observing that "the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." 407 U.S. at 500. The concurring opinion agreed to his standing because of a specific statutory prohibition against race discrimination. 407 U.S. at 503, 504. The dissenting opinion would have required a demonstration by the petitioner of prejudice to him or a basis for presuming prejudice by establishing that his conviction resulted from the exclusion of blacks. 407 U.S. at 507.

The majority opinion in *Peters* believed that there would have been no question whatever of the petitioner's standing to challenge the exclusion of

blacks had the trial and conviction been "post-Duncan." 407 U.S. at 500. Indeed the dissenting opinion agreed "that juries, should not be deprived of the insights of the various segments of the community, for the 'common-sense judgment of a jury' referred to in Duncan v. Louisiana, 391 U.S. 145, 156, 20 L.Ed 2d 491, 500, 88 S. Ct. 1444 (1968), is surely enriched when all voices can be heard. But we are not here concerned with the essential attributes of trial by jury. In fact, since petitioner was tried two years before this Court's decision in Duncan, there was no constitutional requirement that he be tried before a jury at all." 407 U.S. at 510, 511.

Appellant was tried and convicted in 1972, subsequent to *Duncan* and the Court *is* "here concerned with the essential attributes of trial by jury." See *Williams v. Florida*, 399 U.S. 78, 100 (1970) and *Carter v. Jury Commission*, 396 U.S. 320 (1970). When *Duncan* made the Sixth Amendment applicable to the states via the Fourteenth, it also made relevant to state court jury proceedings the following observation by the Court in *Ballard v. United States*, supra:

> "Reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant–there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 329 U.S. at 195.

III.

LOUISIANA CAN SHOW NO COMPELLING PUBLIC INTEREST FOR THE AUTOMATIC EXEMPTION.

In *Peters v. Kiff*, supra, the majority opinion revealed that:

> "It is of course a separate question whether his challenge would prevail, i.e., whether the exclusion might be found to have sufficient justification. See Rawlins v. Georgia, 201 U.S. 638, 640, 50 L. Ed 899, 900, 26 S. Ct. 560 (1906) holding that a state may exclude certain occupational categories from jury service 'on the bona fide ground that it is for the good of the community that their regular work should not be interrupted.' We have no occasion here to consider what interests might justify an exclusion, or what standard should be applied, since the only question in this case is not the validity of an exclusion but simply standing to challenge it." 407 U.S. at 510, footnote 10.

A post-*Duncan* automatic jury duty exemption for all women in state courts can no more be justified than the blanket exemption granted to all daily wage earners in *Thiel v. Southern Pacific Co.*, supra, 328 U.S. 217 (1946).

In *Thiel* the Court reasoned that "a Federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved." 328 U.S. at 224. The Court further stressed that jury service is a duty as well as a privilege and that a blanket exclusion of all daily wage earners weakens the institution of trial by jury.

Appellee relies entirely on this Court's opinion in *Hoyt v. Florida*, supra 368 U.S. 57 (1961), which upheld a similar statutory exemption. However the

sands of time have shifted beneath the foundation of *Hoyt*. Its legal and factual considerations are no longer relevant.

Legally, "strict scrunity" of the statutory exemption is now required rather than the "minimum rationality" test employed by the Court in *Hoyt*, because by the exemption appellant has been deprived of a fundamental constitutional right, *Duncan v. Louisiana*, supra 391 U.S. 145 (1968); *San Antonio Independant School District v. Rodriguez*, supra, 411 U.S. 1 (1973).

Factually, the exemption can no longer be justified by the assumption in *Hoyt* that women are "the center of home and family life." Only a portion of women today fit that description. The percentage of women in the labor force has rapidly grown so that by the end of 1972 over 33 million women were included and 42% of these were permanent, full time workers. 58.5% of women workers were married and living with their husbands. *Women's Bureau, U.S. Department of Labor, Highlights of Women's Employment and Education; Women in The Labor Force.* 26.9% of mothers with children under three years of age; 36.1% with children 3-5 years of age; 50.2% with children 6-17 years of age were in the labor force. *Hayghe, Labor Force Activity of Married Women, U.S. Department of Labor, Monthly Labor Review, Table 4 at 34 (April 1973).* In Louisiana, the statistics generally reflect those for the nation. *Bureau of the Census, 1970 Census of Population, General Social and Economic Characteristics, Final Report PC (1) - C - 20 Louisiana 195.* The same source reveals that in 1970 – 37% of the mothers with children under 18 were in the labor force and 59% of the total adult female population had no children under the age of 18. Over half of all Louisiana women in the labor force 25 to 59 years old hold permanent full time jobs. *Holton, Administrator, Commission on the Status of Women, State Department of Labor of*

Louisiana Women Workers in Louisiana, 1970 (July 1972).

Louisiana is the only state to retain an automatic, volunteers only, exemption for women. *Library of Congress Legislative Reference Service, American Law Division, June 10, 1970 report to the Senate; in Hearing on S. J. Res. 61 Before the Subcomm. on Constitutional amendments of the Senate Comm. on the Judiciary, 91st Cong, 2d Sess. 725-27 (1970).* Moreover, the exemption does not extend to the federal courts in Louisiana. See 28 U.S.C. §1862. Appellee cannot responsibly argue that it would place too great an administrative burden on the courts to call women for jury duty.

IV.

THE LOUISIANA STATUTORY EXEMPTION DISCR"¶INATES SOLELY ON THE BASIS OF SEX WITHOUT REGARD TO FITNESS TO SERVE ON JURIES

Appellee, relying upon *Hoyt v. Florida,* supra, 368 U.S. 57 (1961), argues that the general exemption for women does not purport to exclude women from jury service, "but rather accords them the privilege to serve without imposing the duty to do so." (Motion to Dismiss, p. 2). But men are not accorded the same "privilege" to file with the clerk of court a written declaration of their desire to serve.

Appellant has shown above that statistically the automatic exemption is tantamount to automatic exclusion. For no one can be expected to volunteer for the onerous task of jury service. *Alexander v. Louisiana,* 405 U.S. 625, 643, (Concurring Opinion) (1971).

Since *Hoyt* the Court has adopted a different standard in examining laws or regulations which

discriminate solely on the basis of sex. *Reed v. Reed,* supra 404 U.S. 71 (1971); *Frontiero v. Richardson,* supra, 411 U.S. 677 (1973). No longer may a statute constitutionally draw a sharp line between the sexes solely for administrative convenience, and no longer will the Court permit a distinction based upon assumptions that women are the center of home and family life and that men alone are expected to bear the heat of civic, political and commercial activity.

By a discrimination based solely on sex, without regard to fitness to serve, the automatic exemption granted to women by the Louisiana constitution and statute deprived appellant of a jury selected from a representative cross section of the community in violation of the Sixth and Fourteenth Amendments.

CONCLUSION

The opinion of the Supreme Court of the State of Louisiana affirming appellant's conviction and upholding the constitutionality of La. Const. Art. VII §41

and La. Code of Crim. Proc., Art. 402 should be reversed, and his conviction and sentence to life imprisonment should be annulled and set aside.

Respectfully submitted,

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May, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5744

BILLY J. TAYLOR
Appellant

-v-

STATE OF LOUISIANA
Appellee

Appeal from the Supreme Court of the State of Louisiana

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF THE STATE OF LOUISIANA, APPELLEE

I.

LOUISIANA'S GENERAL EXEMPTION FROM JURY SERVICE GRANTED TO WOMEN BY ARTICLE 7, SECTION 41, OF THE CONSTITUTION OF THE STATE OF LOUISIANA AND ARTICLE 402 OF THE LOUISIANA CODE OF CRIMINAL PROCEDURE DOES NOT VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Article 7, Section 41, of the Louisiana Constitution provides as follows:

> "The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases, provided however, that no woman shall be drawn for jury service unless she shall have previously filed with the Clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which punishment may be by hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict, cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

Article 402 of the Code of Criminal Procedure further provides:

> "A woman shall not be selected for jury service unless she has previously filed with the Clerk of Court of the Parish in which she resides a written declaration of her desire to be subject to jury service."

Neither the Louisiana Constitution nor the Code of Criminal Procedure purports to exclude women from jury service, but rather accords them the privilege to serve without imposing the duty to do so. Women may waive this exemption by simply filing with the Clerk

of the Parish in which they reside a written declaration of their desire to serve.

Appellant does not contend any discriminatory practices by any jury commissioners or state officials.

The Louisiana Supreme Court, in its decision below (App. p. 16-17), held as it consistently has held that Louisiana exemption for women is neither irrational nor discriminatory. In *State v. Edwards*, 287 So: 2d 518 (1973), the Louisiana Supreme Court stated:

> "[1, 2] Women were *not excluded* from jury service by the jury commissioners or by law. The effect of our law is to permit them to serve if they volunteer for service; they cannot be compelled to serve otherwise. La. Const. art. VII, Paragraph 41; La. Code Crim. Proc. art. 402. This Court has consistently held that Louisiana's constitutional and statutory provisions, requiring women to file with the clerk of court of the parish in which they reside a written declaration of their desire to be subject to jury service before they can be selected, impair no federal constitutional right. *State v. Womack*, 283 So. 2d 708 (La. 1973); *State v. Taylor*, 282 So. 2d 491 (La. 1973); *State v. Roberts*, 278 So. 2d 56 (La. 1973); *State v. Enloe*, 276 So. 2d 283 (La. 1973); *State v. Washington*, 272 So. 2d 355 (La. 1973); *State v. Daniels*, 262 La. 475, 263 So. 2d 859 (1972); *State v. Curry*, 262 La. 280, 263 So. 2d 36 (1972); *State v. Amphy*, 259 La. 161, 249 So. 2d 560 (1971); *State v. Millsap*, 258 La. 883, 248 So. 2d 324 (1971); *State*

v. Sinclair, 258 La. 84, 245 So. 2d 365 (1971); *State v. Pratt*, 255 La. 919, 233 So. 2d 883 (1970); *State v. Comeaux*, 252 La. 481, 211 So. 2d 620 (1968); *State v. Dees*, 252 La. 434, 211 So. 2d 318 (1968); *State v. Reese*, 250 La. 151, 194 So. 2d 729 (1967); *State v. Clifton*, 247 La. 495, 172 So. 2d 657 (1965). (Emphasis added.)

In its decisions upholding the constitutional and codal provisions granting women a general exemption from jury service, the Louisiana Supreme Court has followed the authority of this court in *Hoyt v. State of Florida*, 368 U. S. 57, 82 S. Ct. 159 (1961). The court in that case dealt with a Florida statute which was almost identical to the Louisiana provisions in the case at bar.

> "The jury law primarily in question is Fla. Stat., 159, § 40:01 (1), F.S.A. This Act, which requires that grand and petit jurors be taken from 'male and female' citizens of the State possessed of certain qualifications, contains the following proviso:
>
> > 'provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.'
>
> Showing that since the enactment of the statute only a minimal number of women has so registered, appellant challenges the constitutionality of the statute both on its face and as applied

> in this case. For reasons now to follow, we decide that both contentions must be rejected."

In upholding the constitutionality of the Florida statute, this court said:

> "Manifestly, Florida's § 40.01(1) does not purport to exclude women from state jury service. Rather the statute 'gives to women the privilege to serve, but does not impose service as a duty.'"

Appellant's main contentions are that after the decisions of this court in *Duncan v. Louisiana*, 391 U. S. 145 (1968), and *Peters v. Kiff*, 407 U.S. 493 (1972), due process of law requires that a state jury be selected from a representative cross-section of the community, and the general exemption granted to women by Louisiana law has denied him his Sixth Amendment right to trial by a fair and impartial jury as applied to the states by the Due Process Clause of the Fourteenth Amendment and that at some point in time between the *Hoyt* decision in 1961 and appellant's conviction in 1972, the "sands of time have shifted beneath its foundations" and a state may no longer grant an exemption to women for jury service.

The State of Louisiana contends that the Sixth Amendment right to trial by jury as applied to the states by the Due Process Clause of the Fourteenth Amendment does not apply the standards and policies of the federal courts of jury venire make-up and exemtions to the states.

In *Duncan v. Louisiana*, supra, this court applied the Sixth Amendment right to trial by jury to the

states; however, subsequent decisions have shown that the guarantee to a jury trial does not include every vestige of the federal concept of jury trial. In *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970), this court held that the twelve-man requirement is not an indispensable component of the Sixth Amendment jury trial as applied through the Fourteenth Amendment to the states. In *Apodaca v. Oregon*, 406 U.S. 399, 92 S. Ct. 1628 (1972), the court held that State court convictions by less than unanimous juries do not violate right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment.

The issue presented in the case at bar is the validity of an exemption granted to women of a state by that state on the basis of the state interest in the general welfare of its citizens and women as the center of home and family life. It is not a case of jury commissioners systematically excluding persons because of race or any other discriminatory reason from the jury roles. It is a case of a state exercising its right to grant exemptions from jury service for the good of the community based on its awareness and concern with the social and cultural structure of its citizenry.

Appellant cites absolutely no authority for the proposition that a state may not grant such an exemption nor one case in which an exemption granted to citizens of a state has been held to violate the Sixth Amendment right to jury trial through the cross-section of the community requirement of the Due Process Clause of the Fourteenth Amendment.

In his argument, appellant places great emphasis on the decision of this court in *Ballard v. United States*, 329 U.S. 187 (1946). This case involved the systematic and intentional exclusion of women from a Federal District Court jury panel. It did not involve an exemption granted to women. In fact, the court specifically pointed out that there was no exemption provided for women by either Congress or the state in which the district court sat. The holding of the case rested on the fact that the district court had not followed the scheme of jury selection that Congress had adopted. Reversal was based on this court's supervision over the administration of justice in federal courts and no mention at all was made of any constitutional issue being presented. At page 193 the court concluded:

> "We conclude that the purposeful and *systematic exclusion* of women from the panel in this case was a departure from the scheme of *jury selection* which *Congress* adopted and that, as in the *Thiel* case, we should exercise our *power of supervision over the administration of justice in the federal courts, McNabb v. United States*, supra, to correct an error which permeated this proceeding." (Emphasis added.)

The other authorities appellant cites, *Smith v. Texas*, 311 U.S. 128 (1941), *Carter v. Jury Commission*, 396 U.S. 320 (1970) and *Peters v. Kiff*, supra, (1972), all dealt with racial discrimination.

In *Smith v. Texas*, supra, Justice Black, speaking for the court at P. 130, overturned convictions based on racial discriminations by state officials in violation

of the constitution and laws enacted under it, referring by footnote 4 to 18 Stat. 336, 8 U.S.C. § 44, the federal statute prohibiting racial discrimination in jury selections. The case did not hold that a proportional segment of each class of a community must be present on jury panels. The case dealt with exclusion by invidious discrimination, not with an exemption granted to a particular class on a rational and historic basis.

In *Carter v. Jury Commission*, supra, at 523, 524, this court dealt with racial discrimination by jury commissioners and pointed out the injurious brand placed on Negroes by their exclusion, which contravenes the long-standing constitutional and statutory prohibition against racial bias in selecting juries.

In *Peters v. Kiff*, supra, although a white challenged his conviction on the basis of Negroes being excluded from the jury roles, the case still dealt with the long-standing concern through the constitution and acts of Congress with the systematic exclusion of blacks by state officials. This constituted an illegally-drawn jury by reason of Congressional Act, 18 U.S.C. § 243. The court did not say that a defendant was entitled to a proportional cross-section of the community, but in dicta said, referring to *Williams v. Florida*, supra, that a fair possibility for obtaining a cross section of the community should be present. *Williams*, supra, spoke of *arbitrary exclusion* of a particular class being forbidden.

All of these cases dealt with the problem of racial discrimination by officials in selecting jury roles and none dealt with exemptions granted to women by a state for their benefit.

Additionally, no specific holding was made in these cases requiring a jury panel reflective of a cross-section of the community. What was mentioned was a fair possibility of a jury panel reflective of a cross-section of the community free of *arbitrary* exclusion.

In the case at bar, a cross-section of the community is available for jury duty. Women, as a class, are not prohibited from service. If they choose to serve, they may. There is no allegation nor any evidence presented that jury commissioners or state officials systematically exclude women from the roles once they choose to serve.

The right of a state to exempt certain classes from jury service is of long standing. In *Rawlins v. Georgia*, 201 U.S. 638 (1906), Justice Holmes stated at 640:

> "But if the state law itself should exclude certain classes on the *bona fide* ground that it was for the good of the community that their regular work should not be interrupted, there is nothing in the Fourteenth Amendment to prevent it. The exemption of lawyers, ministers of the gospel, doctors, and engineers of railroad trains, in short substantially the exemption complained of, is of old standing and not uncommon in the United States. It could not be denied that the State properly could have excluded these classes had it seen fit, and that undeniable proposition ends the case."

See also *Zelechower v. Younger*, 424 F. 2d 1256, 1259 (9th Cir. 1970).

The right of exemptions for women from jury service is of long standing in both state and federal courts. *Hoyt v. Florida*, supra, at 60.

Considering the above, the State of Louisiana contends that after *Duncan v. Louisiana*, supra, the state is still free to determine its own policy of exemptions, even if they do not coincide with those of the federal courts, if it meets the test stated in *Hoyt v. Florida*, supra, at 61:

> "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation."

And as this court decided in *Hoyt*, an exemption for women would meet this test. As Justice Harlan pointed out at page 61, 62, :

> "In neither respect can we conclude that Florida's statute is not 'based on some reasonable classification,' and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. *We cannot say that it is constitutionally impermissible for a State*, acting in pursuit of the

> *general welfare*, to conclude that a woman should be relieved from the civic duty of jury service *unless she herself determines* that such service is consistent with her own special responsibilities.
>
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> It is true, of course, that Florida could have limited the exemption, as some other States have done, only to women who have family responsibilities. But we cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasable to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption." (Emphasis added.)

Appellant alleges that since *Hoyt* the court has charged its standard for examination of laws that discriminate solely on the basis of sex. The cases that appellant relies on as examples of this court's changed attitude are *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 532 (1973). The court, in both cases, recognized that the questionable statutes were based on speed and efficiency in handling of administrative functions. This court recognized that administrative convenience, while not completely lacking in importance, is subordinate to high priorities such as where there is a statutory scheme that draws a sharp line between the sexes.

But the Louisiana provisions complained of do

not rest their origin in mere matters of administrative convenience. Instead, Louisiana is attempting only to regulate and provide stabliity to the state's own idea of family life.

The Idaho provision in *Reed v. Reed*, supra, was a mandatory statute that gave men preference over women in administration of an estate. The probate court in Idaho recognized the equality of applicants for the position without any determination of relative capabilities in performance of the functions incident to an administration of an estate. The presumption was conclusive in *Reed* that the father of the deceased was more suitable than the mother to administer the estate. *Reed* did not deal with whether sex is a suspect classification. But such a contention was brought out in *Frontiero v. Richardson*, which dealt with a female married Air Force officer challenging a federal statute that required proof of her husband's dependency before she could receive increased quarters allowances and housing and medical benefits for her husband. No such proof of dependency was required by a male service member seeking the same allowances with respect to his wife. There were four dissenting justices in *Frontiero* at p. 1773, three of who expressly rejected "that classifications based upon sex, 'like classifications based upon race, alienage, and national origin', are 'inherently suspect and must therefore be subjected to close judicial scrutiny." The dissent pointed out that *Reed* had drawn no such conclusion of sex as an inherently suspect classification.

In the two above mentioned cases there was a purely arbitrary preference in favor of males. The

preference given to women in Louisiana has its history in the unique treatment Louisiana has afforded the family unit without concern for administrative speed or efficiency. Louisiana submits that the exemption given to women by the Louisiana legislature is reasonable and has a rational connection between the preference given to women and the legitimate government end in which Louisiana seeks to protect its family life.

This court has before recognized Louisiana's special interest in protection of family life in *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017 (1971). In *Labine*, this court upheld choices reflected in Louisiana intestate succession that denied acknowledged illegitimate children from claiming rights of legitimate children and permitting acknowledged illegitimates to inherit only to the exclusion of the states as within the power of the state to make. The court concluded at p. 1021 that "the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State." Louisiana is exercising its rule-making powers "to establish, protect and strengthen family life" and whether the court thinks Louisiana's rules are wisely enacted does not bear on the constitutionality of the enactments.

The State of Louisiana has a long tradition of protection of the family founded in its civil law traditions and customs rooted in its historical French and Spanish heritage. See *Labine v. Vincent*, supra.

With this background and tradition of concern for family life and the women at the center of the family, the State of Louisiana has long granted this general exemption to its women from jury service. Because of the state's closeness to its people and awareness of their needs, this court has long left such social and policy questions to the states.

In *Fay v. New York*, 322 U. S. 261 (1947), this court noted at 240:

> "It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible, but women jury service has not so become a part of the testual or customary law of the land that one convicted of crime must be set free by this court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood.

In this regard, states often vary in their innova-

tions or lack of it in developing their systems of criminal justice. With this in mind, this court stated in *Fay*, supra, at 295:

> "We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history, see *People v. Dunn*, 157 N.Y. 528, 52 N.E. 572, 43 L.R.A. 247, and it is still undergoing revision and adaptation to adjust to the tensions of time and locality."

The Federal District Court followed this principle recently in upholding the State of New York's exemption for women from jury service in *Leighton v. Goodman*, 311 F.Supp 1181, 1183 (1970).

Appellant quotes many statistics relating to women in his argument (p. 9-10), yet these would be better presented to the state legislature or Congress than to this court, for statistics cannot reveal the social and traditional concerns of the Louisiana population.

The State of Louisiana is not unresponsive to change or "the sands of time" and, in fact, in April of 1974, voted to enact a new constitution to take effect January 1, 1975, which does not retain an exemption for women as in Section 41 of Article VII of the present constitution. The new Constitution's provision respecting jurors, Article V, Section 33, will read as follows:

"Section 33. (A) Qualifications.

A citizen of the State who has reached the age of majority is eligible to serve as a juror within the parish in which he is domiciled. The legislature may provide additional qualifications.

(B) Exemptions.

The Supreme Court shall provide by rule for exemption of jurors."

The fair import of the new Constitution would also do away with the Code of Criminal Procedure Article 402, as all exemptions will be determined by Supreme Court rule.

To contend that this conviction should be reversed because Louisiana's general exemption has been smothered by the sands of time would ignore the State of Louisiana's concern with, and development of, its system of criminal justice. It has indeed responded to change as it felt its system of justice and citizens required, though perhaps, on this issue, slower than some states. Yet, who can say at what point in time between this court's decision in *Hoyt v. Florida*, supra, in 1961, and appellant's conviction in 1972, it became too late to meet constitutional requirements of due process?

Considering the above arguments, the State of Louisiana contends that its general exemption of women from jury contained in its present Constitution and Code of Criminal Procedure is reasonable and not discriminatory nor violative of the right to a fair and impartial jury as applied to the states by the Due Process Clause of the Fourteenth Amendment. As to this issue, the number of women who have served on juries in the state is irrelevant, as stated by the court in *Hoyt v. Florida*, supra, at 65:

> "This argument, however, is surely beside the point. Given the reasonableness of the classification involved in § 40.1 (1), the relative paucity of women jurors does not carry the constitutional consequence appellant would have it bear. 'Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period.' *Hernandez v. Texas*, supra, at 482."

II.

APPELLANT, A MALE, HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE GENERAL EXEMPTION GRANTED TO WOMEN FROM JURY SERVICE BY LOUISIANA LAW, AS HE IS NOT A MEMBER OF THE ALLEGEDLY EXCLUDED CLASS, NOR SHOULD HIS CONVICTION BE SET ASIDE WITHOUT A SHOWING ON HIS PART OF SOME POSSIBILITY OF HARM OR PREJUDICE.

Appellant, who urges no prejudice or bias by the all-male jury which convicted him, would have the court reverse an unquestionably fair and impartial trial on the basis that not enough members of a class of which he is not a member, were not included in the jury selection process. He makes no allegations that,

had women been included, his trial would have been any more fair or impartial, nor that their absence caused him any harm.

The State of Louisiana has urged this court to uphold its constitutional and codal exemptions. In either case the State contends that petitioner, a male, has no standing to challenge this jury panel or have his conviction set aside on the basis that there were not enough women on the jury roles. To allow reversals of obviously fair and unbiasd convictions on the basis that an exemption granted by the state to some class, of which petitioner is not a member, without even a hint of prejudice opens the door for any convicted defendant to "shop" around the community for any identifiable group who, for any reason, might not be compelled to serve on juries — in effect, to escape conviction on a technicality without the slightest consideration of whether he has suffered any harm.

Appellant relies on *Peters v. Kiff*, supra, and *Ballard v. United States* for this contention. However, there is a great distinction between these cases and the rationale behind them and the case at bar. Both cases involved illegal discrimination by officials charged with jury selection. In his brief, appellant, at page 7, quotes selectively from *Ballard* but perhaps the entire quote is more revealing of the issue under consideration.

> "But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. *The*

> *systematic and intentional exclusion* of women, like the exclusion of a racial group, *Smith v. Texas*, 311 U.S. 128, or an economic or social class, *Thiel v. Southern Pacific Co.*, supra, deprives the jury system of the broad base it was *designed by Congress* to have in our democratic society. *It is a departure from the statutory scheme.* As well stated *in United States v. Roemig*, 52 F. Supp. 857, 862, 'Such action is operative to destroy the basic democracy and classlessness of jury personnel.' It 'does not accord to the defendant the type of jury to which the law entitles him. *It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him.* Cf. *Kotteakos v. United States*, 328 U.S. 750, 764-765. The injury is not limited to the defendant — there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (Emphasis added.)

What the court was concerned with in its reversal was the Federal District Court's intentional exclusion of women in violation of the statutory system of jury selection set out by congress. In addition there was a woman involved as a defendant in the trial and a possibility of prejudice. See *Ballard*, supra, at 194, 195. Additionally, as pointed out above, *Ballard* was reversed pursuant to this court's supervisory powers over the administration of criminal justice in federal courts.

In *Peters v. Kiff*, supra, in which this court al-

lowed a white man to challenge the constitutionality of his jury selection because of racial discrimination against Negroes, the court was again faced with an illegal jury selecting process. The decision by a divided court rested on the long concern for preventing racial discrimination and the illegality of such discrimination in jury trials. The holding as announced by Justice Marshall for three members of this court stated:

> "Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case, where the claim is that Negroes were systematically excluded from jury service. *For Congress has made such an exclusion a crime.* 18 U.S.C. § 243." (Emphasis added.) *Peters v. Kiff*, supra, at 2169.

In the concurring opinion of Justice White, this central theme was even stronger:

> "For me, however, the rationale and operative language of *Hill v. Texas* suggest a broader sweep; *and I would implement the strong statutory policy of* § 243, *which reflects the central concern of the Fourteenth Amendment with racial discrimination*, by permitting the petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him" (Emphasis added.) *Peters v. Kiff*, supra, at 2170.

However, in the case at bar, there are no allegations that the State or its officials have attempted to exclude women. The absence of women itself does not carry the same effect as the absence of racial groups and the resulting possibilities of invidious discrimination affecting the criminal jury system. The observaton of this court in *Hoyt v. Florida*, supra, recognized this at page 68.

> "This case in no way resembles those involving race or color in which the circumstances shown were found by this court to compel a conclusion of purposeful discriminatory exclusions from jury service. E.g. *Hernandez v. Texas*, supra, *Norris v. Alabama*, 294 U.S. 587; *Smith v. Texas*, 311 U.S. 128; *Hill v. Texas*, 316 U.S. 400; *Eubanks v. Louisiana*, 356 U.S. 584. There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in these cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evidenced."

Given the situation in the case at bar, where there is no illegal action on the part of the State in its jury selection process, where we are dealing not with a prohibition against a class, but with an exemption, and not with racial discrimination, the State of Louisiana contends that appellant, who is not a member of the alleged absent class, must show some possibility of harm or prejudice to himself in order to have his conviction reversed.

It is true that after *Duncan v. Louisiana*, supra, a defendant does have a right to a fair and impartial jury trial guaranteed by the Sixth Amendment and applied to the State through the Fourteenth Amendment. Also, this court has recently spoken of the need for a fair possibility for representation from a cross-section of the community. Yet, this court has never ruled that a defendant has a right to any particular class on his jury. The principle that jury panels should reflect a cross-section of the community is more a creature of the due process clause than the Sixth Amendment. See *Apodaca v. Oregon*, supra, at 1634 and *Peters v. Kiff*. The principle has developed through the possibility that certain members of a class may suffer from the prejudices likely where discrimination occurs against the class and is especially rooted in the historical struggle against racial discrimination.

The State of Louisiana maintains that it is still necessary for defendant to show that the absence or exclusion of a class which depletes the cross-section of the jury panel has some relationship to possible bias or prejudice in the accused trial, except where the jury panel is challenged as being illegally constituted by purposeful racial discrimination as in *Peters v. Kiff*, supra. In other cases involving classes and groups of communities, a defendant should still be required to show some harm or prejudice and the words of Chief Justice Burger in his dissent in *Peters v. Kiff*, supra, at 2171 should still apply:

> "However, in order for petitioner's conviction to be set aside, it is not enough to show merely that there has been some unconstitutional or unlawful action at the trial level. *It must be established that petitioners's conviction has resulted from the denial of federally secured rights properly asserted by him.* See *Alderman v. United States*, 394 U.S. 165, 171-174, 89 S.Ct. 961, 965-957, 22 L.Ed.2d 176 (1969); *cf. Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L.Ed.2d 697 (1960)." (Emphasis added.)

The State of Louisiana urges that the appellant's conviction not be reversed.

III.

THE STATE OF LOUISIANA REQUESTS THIS COURT, SHOULD IT RULE AGAINST THE STATE, TO NOT APPLY ITS RULING RETROACTIVELY BECAUSE OF THE TREMENDOUS HARDSHIP IT WOULD PLACE ON THE CRIMINAL JUSTICE SYSTEM IN THE STATE.

CONCLUSION

The constitutionality of Article VII, § 41 of the Louisiana State Constitution and Article 402 of the Louisiana Code of Criminal Procedure should be upheld and the conviction of appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter Smith, Assistant Attorney General for the State of Louisiana, counsel for appellee herein, depose and say that on the 8th day of July 1974, I served a copy of the foregoing brief on counsel of record for the defendant, Billy J. Taylor, appellant herein, by mailing same herin to his post office box, P. O. Box 1029, Covington, Louisiana 70433.

All parties required to be served have been served.

.....
WALTER SMITH

Sworn to and subscribed
before me this 8th day
of July, 1974

.....
JULIAN J. RODRIGUE
NOTARY PUBLIC